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No. 73-820

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

PASCUAL GUANA-SANCHEZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 484 F. 2d 590. The oral opinion and the order of the district court (Pet. App. 16a-26a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 14a) was entered on July 18, 1973. A timely petition for rehearing was denied on September 25, 1974 (Pet. App. 15a). On October 17, 1973, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to November 23, 1973. The petition was filed

on that date and granted on June 17, 1974. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a defendant has standing to suppress statements and future testimony of witnesses on the ground that they were unlawfully arrested while passengers in his automobile.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath and affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 274 of the Immigration and Nationality Act of 1952, 66 Stat. 228, 8 U.S.C. 1324(a) provides in pertinent part:

> Any person, including the owner, operator, pilot, master, commanding officer, agent or consignee of any means of transportation who—
>
> * * * * *
>
> (2) Knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law;
>
> * * * * *
>
> any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States * * * shall be guilty of a felony * * *.

STATEMENT

A one-count indictment returned in the United States District Court for the Northern District of Illinois charged respondent Pascual Guana-Sanchez with having knowingly and unlawfully transported three aliens within the United States, in violation of 8 U.S.C. 1324(a)(2). Respondent filed a pretrial motion to suppress evidence and to dismiss the indictment, alleging that he and the passengers in his car had been illegally arrested and that the government's evidence depended upon the testimony of the passengers, said to be the "fruit" of the illegal arrests. The district court denied the motion to dismiss, but, after an evidentiary hearing, granted the motion to suppress statements made by the three passengers and their future testimony at his trial (Pet. App. 16a–26a). The court of appeals affirmed, one judge dissenting (Pet. App. 1a–13a).

1. The relevant facts, as developed at the hearing on the motion to suppress, are as follows:

On Wednesday, November 17, 1971, at approximately 2:30 a.m., in the Chicago suburb of Villa Park,

Illinois, officer Pat Tenuto of the Villa Park police saw a station wagon that had been driven off the road, over the curb and onto a vacant lot in a wooded, exclusively industrial section of Villa Park (A. 6, 8–9, 11, 28). The headlights and interior light were shining, and one of the occupants was reading what appeared to be a map (A. 9). Officer Tenuto said to his partner, officer Hall, " 'Let's go over and see if they are lost or anything is wrong.' " (A. 10).[1] At 2:33 a.m., the officers radioed in to the station house dispatcher the license number of the car (A. 76, line 3), as they are required to do before investigating any vehicle. They then approached the car and saw that respondent, the driver, was reading an Illinois road map. They also noticed that the car contained three passengers, one of them apparently asleep, and three shopping bags filled with "clothing or material" (A. 17). Officer Hall asked respondent if he and his partner could be of assistance (A. 16). Respondent answered that he was looking for a restaurant on North Avenue owned by a friend, the name of which he had forgotten; if unable to find that restaurant, he wanted to find another establishment called the "Beef & Barrel" (A. 16–19). Upon radio inquiry of police departments in nearby towns, officer Tenuto established that no restaurants in the vicinity were open beyond 1:00 a.m. (A. 20).

[1] Officer Tenuto was the only witness at the suppression hearing. The government and defense counsel agreed that officer Hall's testimony would have been "similar" to Tenuto's testimony (A. 68).

Officer Hall asked respondent for some identification (A. 20). Respondent produced an Illinois driver's license issued to Pascual Guana-Sanchez, 9727 South Avenue L., Chicago. Officer Tenuto noted that the date on the license was unexpired and that the license appeared to be valid (A. 21, 58). Officer Hall then asked the three passengers for identification (A. 23). This was in accordance with a standard operating procedure, applicable only to nighttime investigations of automobiles and their occupants, which had been prescribed because many burglaries had occurred in the industrial area of Villa Park (A. 26–27).

The three passengers' only response was to shrug their shoulders and gesture with their hands, indicating that they did not comprehend Hall's question. Hall repeated his question and received the same reaction Hall then asked respondent if he spoke Spanish and requested him to ask his passengers for identification (A. 23). Respondent addressed his passengers in a foreign language and asked, so the officers assumed, whether they had identification. The two passengers in the rear seat shook their heads indicating "no." The passenger in the front seat took out a card and gave it to the officers (A. 24). The writing on the card was Spanish, but officer Tenuto recognized the words "Army," "military" and "Mexico," from which he surmised it was a Mexican Army identification card. At officer Hall's request, respondent again spoke with the passengers in the back seat to make sure that they had understood the request for identification (A. 25).

Officer Tenuto had had several experiences—the most recent only a week earlier—in which groups of people had been discovered in the Villa Park area who spoke Spanish but not English, had no identification, were Mexican citizens and had illegally entered the United States and come by car to the area because there were factories there looking for cheap labor (A. 39–40, 44, 46). With this knowledge officer Tenuto radioed his supervisor, sergeant Weiser, and reported that the two passengers had no identification (A. 25). Weiser arrived on the scene at 2:37 a.m. (A. 76, line 4), a minute or two after Tenuto had radioed him (A. 25). The officers asked respondent to ask the passengers in the back seat to get out of the car, which they did. Then, following standard procedures applicable when unidentified persons are discovered at night sitting in a car parked off the road or near a factory, Sergeant Weiser asked the two passengers, through respondent as interpreter, if they would come to the police station for a security check (A. 25–27). The two passengers entered one of the police cars and were driven to the police station, a three or four minute trip (A. 28).

Meanwhile, officer Hall had asked respondent if he "wouldn't mind coming to the station" while the officers attempted to check out the two passengers who had no identification. Respondent replied, "Fine, I will come with you," and he, along with the passenger who had produced identification, followed the squad cars to the station (A. 28). Tenuto testified that had respondent not gone to the station, the police

would not have brought him there because he had produced identification and, so far as the police then knew, had broken no law (A. 53).[2] Once at the station, moreover, he was free to go at any time, until he was arrested on grounds unrelated to the charges in this case.[3] However, at no time after the police first approached his car did respondent ask or attempt to leave.

The radio dispatcher at the station established, after checking the license plate number that the officers had radioed in, that the car was registered to respondent, had not been stolen, and had not been reported in connection with any crime (A. 58). It is not entirely clear from the record when the officers received this information—but it was apparently either three to five minutes after they had radioed in the number, or a few minutes later when they arrived at the station house.[4]

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[2] Had he attempted to drive away after the officers had returned his driver's license, *i.e.*, when the two unidentified passengers were still in the car, the officers would have pursued him (A. 64).

[3] While respondent was at the station, the police searched his car and found in the glove compartment a gun that was not registered. He was then placed in the detention cell and booked for unlawful possession of the gun (A. 52). No issue concerning this search and arrest is presented in this case.

[4] The dispatcher's radio log (A. 75–76) does not show any return call to Tenuto's patrol car (A. 76, No. 130) or to sergeant Weiser's car (A. 76, No. 132), although the dispatcher may have informed Weiser when he radioed the dispatcher at 2:37 a.m. that he had arrived on the scene (*id.* at line 4). By then the officers had established that the two passengers in the back seat had no identification. At the suppression hearing officer

Within a few minutes of their arrival at the station the supervisor had the three passengers write out their names, and he telephoned an immigration official in Chicago to conduct a name check (A. 30, 33). The immigration officer talked with the passengers, told the supervisor that the passengers had admitted illegal entry into the United States (A. 31–32), and asked the supervisor to hold respondent and the three passengers for the few hours remaining until morning (A. 32–33). When morning came, the passengers were turned over to immigration officers who had come out from Chicago (A. 61). On February 1, 1972, respondent was indicted for having transported the passengers illegally (A. 1–2).[5]

2. In June 1972, the district court granted respondent's pre-trial motion to suppress the statements and future testimony of the three aliens who had been present in respondent's automobile. The court found

Tenuto's initial recollection was that they had learned the results of the license check "[w]hen we got into the station * * *" (A. 57–80), but after reviewing the radio log he said they got an answer back "three to five minutes" after making the radio check (*ibid.*). The district court, apparently misreading the radio log, found that the officers requested the check at 2:33 a.m. and received the answer at 2:35 a.m. (Pet. App. 17a) the radio log reveals that the dispatcher received the answer at 2:35 a.m. (Gov. Ex. 1). The court of appeals did not specify when it believed the officers had received the answer to the license check (Pet. App. 2a), but apparently understood it to have occurred before respondent and the passengers went to the station (Pet. App. 4a, n.3), and perhaps even before the officers had returned respondent's license (Pet. App. 2a).

[5] The record does not clearly establish whether the passengers were given *Miranda* warnings, although officer Tenuto did not do so and knew of no one else having done so (A. 61–62). No issue is raised here in this regard.

that, while the police officers' initial interrogation may have been based on "proper investigative suspicions" (Pet. App. 19a), those suspicions were no longer justified after the officers ascertained that respondent had a valid driver's license and was the owner of the station wagon. Accordingly, the court concluded that the further interrogation of the passengers while they were in respondent's car constituted an unlawful "search" of the car even though they were in "plain view" (*id.* at 24a), and that the arrests of respondent and the passengers were unlawful (*id.* at 19a, 23a). It followed, in the court's opinion, that the discovery of the passengers' status as participants in and witnesses to respondent's offense was the "tainted fruit" of unlawful police conduct, and that their testimony would be "verbal evidence" subject to exclusion on the same basis as unlawfully obtained physical evidence and statements under the "fruit of the poisonous tree" doctrine (*id.* at 23a–24a). Believing that the government had not shown that the testimony of the witnesses could have been obtained independently of the illegal conduct, the court therefore unqualifiedly granted respondent's motion to suppress both the witnesses' statements obtained as a result of their interrogation and the witnesses' future testimony (*id.* at 24a, 26a).

3. On appeal, the government, conceding *arguendo* that the interrogation of the passengers while they were in respondent's car constituted a "search" of the car as to which he had standing to object, contended that the action was a reasonable investigatory stop

consistent with the Fourth Amendment under this Court's decisions in *Terry* v. *Ohio*, 392 U.S. 1, and *Adams* v. *Williams*, 407 U.S. 143. Similar arguments were advanced in support of the transportation of the passengers to the police station and the further questioning and detention of them there. Believing that the legality of respondent's trip to the station (whether regarded as an arrest or a detention) was immaterial to the question whether the statements and future testimony of the passengers were subject to suppression, the government did not address in the court of appeals the legality of respondent's detention.[6]

The majority of the court of appeals panel evidently agreed with the government that the initial questioning of the passengers while in respondent's car was not an unlawful search, for it treated the case as involving only an unconstitutional arrest, and explicitly stated that, "[w]hen the arrest was made," the interrogation of the passengers while inside the car had already occurred (Pet. App. 4a, n.3). With respect to whether respondent or the passengers had

[6] The petition's brief summary of the government's position in this regard may have been unclear, in stating that "[t]he government did not challenge in the court of appeals—and does not challenge here—the district court's conclusions that, when the police took respondent and his passengers to the police station, they made an unlawful arrest" (Pet. 5). While there was no challenge concerning the legality of the arrest of respondent, and we assume *arguendo* here that his arrest was unlawful, the government did defend on appeal the legality of the detention of the passengers, particularly the two who had no identification.

been unconstitutionally seized, the majority focussed only upon respondent and concluded that he had been unconstitutionally arrested when he had been invited to follow the officers to the station (Pet. App. 2a). Without explicitly discussing whether any of the passengers had also been unconstitutionally detained or arrested, the majority affirmed the district court's unqualified suppression of their statements and future testimony on the ground that it was evidence gained after "the arrest" and hence "was 'fruit of the poisonous tree' " (*id.* at 5a).

Judge Pell dissented, concluding, *inter alia*, that respondent had no standing to suppress the witnesses' statements or testimony (an issue which the majority had not discussed), because he was not aggrieved by their detention, "had no proprietary interest in their bodies—or minds," and hence had no legal basis for asserting their right to be free from illegal seizure (*id.* at 12a–13a). Judge Pell also discussed the question whether, assuming that the knowledge that respondent had committed an offense and that the passengers were witnesses to the offense was the product of unlawful police action, the future testimony of the witnesses about events occurring before the encounter with the police should therefore be suppressed (*id.* at 6a-11a). He concluded that the proffer of living witnesses was materially different from the use of inanimate objects as evidence, and that the majority's decision constituted a departure from the general rule that the testimony of a witness should not automatically be suppressed.

SUMMARY OF ARGUMENT

In affirming the district court's order granting respondent's motion to suppress statements made by passengers in his car and their future testimony at his trial, the court of appeals has necessarily held that respondent has standing to challenge the legality of the detention or arrest of the passengers. That ruling contravenes the established principle that only the victim of a Fourth Amendment violation may obtain suppression of the tainted fruit of such official misconduct. For this reason alone, the decision below should be reversed.

ARGUMENT

RESPONDENT LACKS STANDING TO CHALLENGE THE LEGALITY OF THE ARREST OF PASSENGERS IN HIS CAR AND TO SECURE THE SUPPRESSION EITHER OF STATEMENTS THEY MADE IMMEDIATELY AFTER THEIR ALLEGEDLY UNLAWFUL ARREST OR OF THEIR FUTURE TESTIMONY AT HIS TRIAL

1. This case presents questions concerning the availability of one particular remedy—the exclusionary rule—to a person other than the victim of alleged police misconduct violating Fourth Amendment standards.[7] Respondent's disclaimers notwithstanding,[8] the

[7] Since the challenged action here was taken by local police officers, it is subject to the Fourth Amendment principles incorporated in the Fourteenth Amendment. *Elkins* v. *United States*, 364 U.S. 206.

[8] Respondent contended in his opposition that he had "[a]t no point * * * attempted to assert the right of the [persons] * * * discovered in his automobile * * *" (Mem. Opp. 9), that he "could not be less concerned with any violation of the rights of the passengers * * *" (*id.* at 10), that he "has not challenged the arrest of the passengers" (*id.* at 11), and that he "asserts the rights of no one but himself" (*ibid.*).

judgment of the court of appeals in this case necessarily determined that respondent was entitled to suppression of evidentiary fruits of the allegedly unconstitutional arrest of his passengers, not of himself.

It is difficult to appreciate what led the majority of the court of appeals to its apparently novel result. Perhaps the government itself misled the court by debating the propriety of questioning the passengers while they were still in the car, on the premise that this amounted to a "search" of an area under the respondent's control. We were then challenging the district court finding that this "search" was unlawful. Cf. *Cardwell* v. *Lewis*, No. 72–1603, decided June 17, 1974, slip op., pp. 5–8 (plurality opinion). See, also, *United States* v. *Dionisio*, 410 U.S. 1, 13–15; *Abbott* v. *Beto*, 469 F. 2d 1324, 1325 (C.A. 5).[9] But, correctly we think, the court of appeals did not endorse that ruling. On the contrary, it focused entirely on what it characterized as the subsequent "arrest" of respondent and his passengers when they were "ordered" to the police station. See Pet. App. 3a–5a and nn. 3, 4. Moreover, as the court below itself stressed (Pet. App. 4a, n. 3), no incriminating information can be traced to the few questions asked while the passengers were inside the vehicle. The alleged "search" of the car is no part of the case as it reaches this Court.

Nor is respondent's own "arrest" relevant. Respondent himself made no incriminating statements, and

[9] There was, in fact, no "search" of the car in the constitutional sense: the passengers were in plain view and the officers never entered the vehicle.

his arrest yielded no information pointing to the commission of an offense or his passengers' status as witnesses thereto. Had respondent alone been arrested, there would plainly have been no "tainted fruit." Conversely, if only the two passengers, but not respondent, had been arrested, the same incriminating information would have been obtained. Thus, any invasion of respondent's Fourth Amendment rights is entirely unconnected with the evidence suppressed.

It follows that the ruling below amounts to a determination that the driver of a car may be permitted to challenge the constitutionality of the arrest of his passengers and to seek suppression and exclusion of evidence derived therefrom. That, we suggest, is a gross departure from the established principles of standing.

2. The victim of an unconstitutional search or arrest may be entitled to various forms of redress. *E.g., Bivens* v. *Six Unknown Named Agents,* 403 U.S. 388; *Wolf* v. *Colorado,* 338 U.S. 25, 30, n. 1; Fed. R. Crim. P. 41(*e*). But those remedies are normally available to him alone. See, *e.g., California Bankers Assn.* v. *Shultz,* No. 72–985, decided April 1, 1974, Slip op., pp. 43–46. At all events, that is the settled law with respect to the right to suppress unconstitutionally obtained evidence. *Brown* v. *United States,* 411 U.S. 223, 230–231; *Alderman* v. *United States,* 394 U.S. 165, 174; *Simmons* v. *United States,* 390 U.S. 377, 389; *Wong Sun* v. *United States,* 371 U.S. 471, 492. This elementary rule, it seems to us, controls the case.

Even if, as the government was content to concede below, "the testimony of witnesses discovered during

an illegal search" can be suppressed by the owner of the premises, it by no means follows, as the court of appeals thought (Pet. App. 5a, n. 4), that "the same is true in the event of an illegal arrest." The distinction is fundamental: in the first case, the evidence is at least in some sense the fruit of conduct which has violated the applicant's rights; in the second instance, the relevant victim is the witness, not the party seeking suppression.

Thus, here, if the passengers had been uncovered hidden in respondent's car as a result of an improper search, the claim for standing would be colorable because respondent could assert that *his* right of privacy had been invaded. But he has no legal interest in the security of his passengers against unlawful arrest. That is a matter for their complaint, not his. As Judge Pell put it, dissenting below (Pet. App. 12a–13a), "[t]he fact that the passengers had been in the defendant's automobile should not * * * create some sort of vicarious standing. * * * He has no proprietary interest in their bodies—or minds."

3. In our view, the case is controlled by the traditional rules of standing. Because that seems so plain, we do not burden the Court with alternative arguments. If it were otherwise, we would suggest the inappropriateness of applying the exclusionary rule here, especially as to the future testimony of witnesses. We would question whether any substantial "incremental deterrent effect" on official misconduct would result (see *Michigan* v. *Tucker,* No. 73–482, decided June 10, 1974, slip op., pp. 12–18; *United States* v. *Calandra,* 414 U.S. 338, 349–352); we would argue that the link

between the arrests and at least future testimony would be " 'so attenuated as to dissipate the taint' " (see *Wong Sun* v. *United States, supra,* 371 U.S. at 491; *United States* v. *Bayer,* 331 U.S. 532; 539–541; *Nardone* v. *United States,* 308 U.S. 338, 341); and we would invoke the opinion of the present Chief Justice while on the court of appeals in *Smith* v. *United States,* 324 F. 2d 879, 881–882 (C.A.D.C.), certiorari denied, 377 U.S. 954. See, also, Brief for the United States in *Michigan* v. *Tucker,* No. 73–482, pp. 36–44. We eschew discussion of these issues only because, absent standing in respondent, they do not arise in our analysis of the case. See Pet. 11–12, n. 4.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded to the district court for further proceedings.

Respectfully submitted.

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